

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9854 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

AKASHDEEP HOUSING SOCIETY THRO' DR. PATEL THAKORBHAI C.
Versus
KANUBHAI PARSHOTTAM PATEL

Appearance:

1. Special Civil Application No. 9854 of 2002
MR KB PANDE for Petitioner No. 1
MR PRAKASH THAKKAR, Ld. Senior Counsel
with MR Parthiv B SHAH for Respondent Nos. 1 to 6
.....for RESPONDENT NO. 7-8

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 01/10/2002

ORAL JUDGEMENT

In this petition which is filed under Article 227

of the Constitution of India, petitioner seeks to challenge the judgement and order dated January 7, 2000 passed by the learned Extra Assistant Judge, Vadodara in Civil Misc. Appeal No. 409 of 1999 by which appeal filed by the Respondent Nos 2 to 6 herein came to be allowed and thereby order passed below application Exhibit-5 in Regular Civil Suit No. 769 of 1999 by the learned Civil Judge (SD), Vadodara has been set aside.

2. The case of the petitioner is that respondents herein have threatened the members of the petitioner society and have started illegal construction on road of the petitioner society. The petitioner, therefore, filed Regular Civil Suit No. 769 of 1999 in the Court of learned Civil Judge (SD), Vadodara for declaration and injunction. Along with the Suit, petitioner has also filed application Exhibit-5 under Order 39 Rule 1 & 2 of Civil Procedure Code seeking ad interim injunction against the respondents. Suit as well as application has been contested by the respondents by filing written statement as well as written objections against application Exhibit-5. The learned Civil Judge (SD), Vadodara, after hearing the parties and considering the pleadings and the documents annexed therewith has allowed the application Exhibit-5, and respondent nos. 2 to 6 are directed that they should leave 3 meters margin from the disputed road of 7.5 meters and without leaving the said margin they cannot do the construction over the land from where telephone connection, water connection, electric connection lines are going towards petitioner/plaintiff society the respondents/defendants may do the construction after leaving this space till final disposal of the Suit.

3. Respondent Nos. 2 to 6, aggrieved thereby knocked the doors of the District Court by filing Misc. Civil Appeal No. 409 of 2002. The said appeal was placed for hearing before the learned Extra Assistant Judge, Vadodara. The learned Extra Assistant Judge, Vadodara, after hearing the learned advocates for the parties and considering the pleadings and the documents produced before the Lower Court, came to the conclusion that the petitioner has no prima facie case nor balance of convenience tilts in its favour and irreparable injury also would not be caused to the petitioner. On the contrary respondent Nos. 2 to 6/appellants have a prima facie case, balance of convenience also tilts in their favour and if injunction as prayed for is granted or injunction as granted by the learned Trial Judge is continued, it would cause irreparable injury to the respondent Nos. 2 to 6. On the basis of the aforesaid

findings, learned Extra Assistant Judge, Vadodara has allowed the appeal and thereby set aside the order passed below application Exhibit-5 and thereby vacated the injunction granted in favour of the petitioner, which has given rise to the present petition at the instance of the original plaintiff.

4. Mr. K.B.Pande, learned advocate for the petitioner contended that the learned Extra Assistant Judge, Vadodara has misread the evidence and without considering the documentary evidence and more particularly panchnama, has passed the impugned order, therefore, learned Judge has misdirected himself in passing the order and therefore, this Court, exercising the power under Article 227 of the Constitution has ample jurisdiction to entertain the petition. According to the learned advocate for the petitioner, there was no earthly reason for the learned appellate Judge to up set the reasoned order recorded by the learned Trial Judge. He, therefore, urged that the order which is impugned in this petition is required to be quashed and set aside by restoring the order passed below application Exhibit-5 by the learned Trial Judge and, therefore, this petition requires admission.

5. Mr. Prakash Thakkar, learned Senior Counsel countered the submissions made by Mr. K.B.Pande, learned advocate for the petitioner and contended that this Court, while exercising the powers under Article 227 has a very limited jurisdiction. According to him, even error of law, on the face of it cannot be corrected in a petition filed under Article 227 of the Constitution. This Court, has to look into only jurisdictional error committed by the learned Trial Judge and if it is found that any jurisdictional error is committed by the appellate Court, then this Court can interfere with the impugned order. Mr. Prakash Thakkar has further invited my attention to the observations made by the learned appellate Judge and contended that the learned Judge has considered all the aspects including panchnama and has come to the conclusion that the petitioner is not the owner of the disputed land but the respondent Nos. 2 to 6 are the owners of the disputed land. According to him, even that finding recorded by the learned appellate Judge, howsoever erroneous may be, cannot be interfered by this Court under Article 227 of the Constitution as jurisdiction sweep is very limited. According to the learned Counsel, the learned Trial Judge has not recorded the prima facie case in favour of the petitioner nor has given finding with respect to the balance of convenience or irreparable injury as against this, learned Extra

Assistant Judge has given the categorical finding that the plaintiff has no prima facie case nor balance of convenience tilts in its favour and no question of considering the irreparable injury in favour of the petitioner. He, therefore, urged that the learned appellate Judge has given a finding that, respondent Nos. 2 to 6 have a prima facie case as they are the owners of the disputed land. They got the plan sanctioned by the competent authority and as per the plan they are making construction. He, therefore, urged that this petition may be rejected as it is devoid of any merits.

6. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the memo of the petition, grounds set out therein and the impugned order recorded by the learned Extra Assistant Judge, Vadodara.

7. At the outset, it may be stated that the learned trial Judge has not given any finding with respect to the prima facie case, balance of convenience and irreparable injury. The learned trial Judge has observed that the respondent Nos. 2 to 6 are doing the construction without leaving 3 meters margin from the disputed road of 7.5 meters. In her opinion, it is the primary necessity of the petitioner society and if any fault accrues in future, then it cannot be repaired or replaced if construction is permitted and in view of this she passed the impugned order granting ad interim relief in favour of the petitioner.

8. So far as the finding recorded by the learned Extra Assistant Judge, Vadodara is concerned, in para 12 of the impugned judgement and order it is stated that the petitioner has not established that the petitioner is the owner of the said land. Petitioner has also not produced any documentary evidence to show that the respondent Nos. 2 to 6 are not the owners of the said land. On the contrary, respondent Nos. 2 to 6 have established that they are the owner of the disputed land. Petitioner has produced a copy of the TP Scheme, the approved plan and the N.A permission granted in favour of the respondents and looking to these documents, it is established that the respondent Nos. 2 to 6 are the owners of the said land. The Municipal Corporation has also sanctioned the lay out plan and has given the construction permission in favour of the respondent Nos. 2 to 6.

9. So far as panchnama prepared by the Court Commissioner is concerned, the learned Extra Assistant Judge, Vadodara has given the finding in para 13 of the

impugned judgement and order and ultimately said that the petitioner has failed to establish that the respondents are making construction without leaving 3 meters margin from the disputed road of 7.5 meters, according to law, and therefore, petitioner has not established that respondent Nos. 2 to 6 are not the owner of the said land bearing Survey No. 363 and have no legal right to dig and to prepare any building or structure on the said land. After giving the aforesaid finding, the learned Extra Assistant Judge has also considered the question of prima facie case, balance of convenience and irreparable injury, and thereafter, observed that the learned trial Judge has committed a grave error in passing the order impugned before him.

10. In view of the aforesaid finding recorded by the learned Extra Assistant Judge, Vadodara, I am of the opinion that the learned Extra Assistant Judge, Vadodara has neither committed error in facts nor in law in passing the impugned order. It may be appreciated that this petition is filed under Article 227 of the Constitution. It is settled principle of law that normally High Court should not interfere in a petition filed under Article 227 of the Constitution and High Court should not interfere with the findings of facts recorded by the Court or authorities below.

11. In the case of ACHUTANANDA BAIDYA V. PRAFULLYA KUMAR GAYEN AND OTHERS, AIR 1997 SC 2077, Supreme Court has said that the jurisdictional sweep of the High Court under Article 227 of the Constitution is very limited but it is always not so and this Court can interfere in a petition filed under Article 227 of the Constitution in a given case where the lower Court has decided the matter on erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice.

12. Mr. K.B.Pande, learned advocate for the petitioner is unable to dislodge the finding recorded by the learned Extra Assistant Judge, Vadodara. On the contrary, on the facts and in the circumstances of the case and applying the principle laid down in above referred to judgement to the facts of the present case, I am of the opinion that the ultimate conclusion arrived at by the learned Extra Assistant Judge, Vadodara cannot be called as erroneous assumption or acting beyond its

jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice.

13. It is settled principle of law that finding of facts recorded by the courts below cannot be assailed in a petition filed under Article 227 of the Constitution of India since the powers vested in Court under Article 227 of the Constitution of India is a supervisory jurisdiction. The High Court must confine itself to the correcting of error of jurisdiction committed by the courts below and it cannot assume suo motu jurisdiction of appellate court and correct every mistake assumed to have been committed by the courts below. It is a review of the decision making process and not the decision itself. The High Court cannot reappraise preliminary or perceptive facts found by the fact finding authority under the statute. The aforesaid proposition of law is laid down by the Apex court in the case of (i) Mohd. Yunus v. Mohd. Mustaqim & others, AIR 1984 SC 38, (ii) Khanna Improvement Trust v. Land Acquisition Tribunal and others (1995) 2 SCC 557 and (iii) H.B. Gandhi v. M/s. Gopinath (1992) Supp. 2 SCC 312 and (iv) State of Maharashtra v. Milind and others, (2000) 1 SCC 4.

14. It is also required to be noted that by virtue of the amended Act 1999 made in the Civil Procedure Code, proviso is added to Section 115 which in terms provide that; "the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings". By virtue of the aforesaid provision, power vested under Section 115 of the Code of Civil Procedure is circumscribed, therefore, what cannot be granted under Section 115 can never be granted in a petition filed under Article 227 of the Constitution. When the legislature has already provided to put restriction upon the revisional jurisdictions envisaged under Section 115 of the Code of Civil Procedure, I am afraid that same exercise can be undertaken in exercise of power under Article 227 of the Constitution of India. It is well settled that the thing which cannot be allowed to be done directly, cannot be done indirectly.

15. Seen in the above context, I am of the opinion

that there is no valid reason or justifiable ground to interfere with the impugned order. On the contrary, impugned order requires confirmation by this Court, and hence, petition deserves to be rejected at its inception.

16. For the foregoing reasons, the petition fails and accordingly it is rejected at the threshold with costs which is quantified at Rs.5000/-. The petitioner is hereby directed to deposit the cost of Rs.5000/- with the registry of this Court within a period of four weeks hereof failing which the Registrar of this Court is directed to proceed to recover the said cost under the Bombay Land Revenue Court by sending the matter to the Collector, Vadodara. On realising the aforesaid amount of cost of Rs.5000/-, Registrar is further directed to pay the said amount to the Respondent Nos. 2 to 6 upon due verification.

17. At this stage, Mr. K.B.Pande, learned advocate for the petitioner prays that the impugned judgement and order passed by the learned Extra Assistant Judge, Vadodara, is stayed on the basis of the statement made by the other side, up to tomorrow, that is, 2.10.2002, and therefore, it may further be stayed for some more time to enable the petitioner to approach the Supreme Court. Mr. Prakash Thakkar, learned Senior Counsel for Respondent Nos.2 to 6 has objected to the granting of this relief on the ground that this petition has been dismissed by this Court as it is filed under Article 227 of the Constitution wherein jurisdiction sweep is very limited. Besides this, when this Court has agreed with the findings recorded by the learned Extra Assistant Judge, Vadodara, and this Court has rejected the petition in limine, therefore, the relief as prayed for cannot be granted.

18. Having considered the rival submissions on the point of continuing the interim relief, I am of the opinion that the learned Extra Assistant Judge has given cogent reasons for not granting the ad interim relief in favour of the petitioner which has been confirmed by this Court. Besides this, this petition is filed under Article 227 of the Constitution under which the jurisdictional sweep is very limited, and therefore, prayer made by the petitioner cannot be entertained and hence it is rejected.

(A.M.Kapadia, J)
Jayanti*